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September 24, 1990

Ms Kaye Joachim, Legal Services, Ontario Human Rights Commission  
12th floor, 400 University Avenue, Toronto, Ontario M7A 2R9

Mr James D. Henderson, c/o Keyser Mason Ball & Lewis, 201 City Centre  
Drive, Suite 701, Mississauga, Ontario L5B 2T4

Ms Daphne Lutz, 3352 Carillion Ave, Mississauga, Ontario L5C 2B1

Ms Joanne Cosgrove, 2355 W. Hales Road, Mississauga, Ontario, L5B 2B3

Gray's Lakehouse Restaurant, 15 Hurontario St., Mississauga, Ont. L5G 3G8  
Attention Mr Andy Gray

Ms Joan Hamel, 425 Rathburn Road East, Building # 10, Unit #59  
Mississauga, Ontario L4Z 1H6

Mr Neil Benvenuti, c/o Rafferty's, 2749 Lakeshore Blvd. West, Toronto,  
Ontario M8V 1H2

Please be advised that the next hearings in the matter of Daphne Lutz and  
Joanne Cosgrove v. Gray's Lakehouse Restaurant, Joan Hamel and Neil  
Benvenuti are scheduled for Tuesday and Wednesday, October 9 and 10, at  
10:30 AM at Ramada Hotel Airport West, 5444 Dixie Road, Mississauga  
(Willow Room on Oct. 9, and Hickory Room on Oct. 10). If you do not attend,  
hearings may proceed in your absence.

My order denying the motion to dismiss is enclosed.

Chairman, Board of Inquiry

cc Ms Thelma Hamilton, Ministry of Citizenship, 5th floor, 77 Bloor St. West,  
Toronto M7A 2R9

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1981, c. 53, as amended, SS. 4(1), 8 AND 11,

AND IN THE MATTER OF DAPHNE LUTZ AND JOANNE COSGROVE,  
COMPLAINANTS, AND GRAY'S LAKEHOUSE RESTAURANT, NEIL BENVENUTI,  
AND JOAN HAMEL, RESPONDENTS.

APPEARING FOR THE ONTARIO HUMAN RIGHTS COMMISSION: KAYE  
JOACHIM;

APPEARING FOR GRAY'S LAKEHOUSE RESTAURANT: JAMES D. HENDERSON.

BEFORE W. GUNTHER PLAUT, CHAIRMAN OF THE BOARD OF INQUIRY.

Interim Decision.

The following are facts agreed upon:

Daphne Lutz is a black West Indian who, around August 1984, was employed as a day-time kitchen helper by Gray's Lakehouse Restaurant. She alleges that in early 1985 she was being harassed and that on June 5, 1985 she was terminated from her employment. She filed a complaint with the Ontario Human Rights Commission ("Commission") on August 30, 1985 against the Restaurant, as well as against Manager Benvenuti and Office Manager Hamel, claiming that her race and color were determining factors in her termination.

Joanne Cosgrove began working at the Restaurant around November 1984 and alleges that she noticed Lutz being harassed by management. She voiced her concern to the office manager and thereafter was herself harassed by Hamel and Benvenuti and was subsequently suspended from her job. She filed a complaint with the Commission on August 30, 1985 claiming that her association with Lutz was the main factor in her determination.

The restaurant ("Respondent") was and is owned by Vincent Gray Investments Ltd. of which Andrew James Gray was and is president. The operations manager of the restaurant during the time of the alleged discrimination was Peter Vincent, who was also Secretary-Treasurer of the owner-corporation. He left his positions in 1989.

Employee pay rolls were introduced (Exhibit 6) to show that turnover of employees was very high since the time the complaint was filed. Lisa Heron, appearing as a witness at the hearing, is the only remaining day-time employee. While she remembers the complainants she had no direct knowledge of the circumstances leading to their complaints. She further testified that probably some 7 or 8 employees worked the day-time shift when the alleged violations took place.

Counsel for the Commission indicated that the long delay between the filing of the complaint and appointment of the Board of Inquiry (August 13, 1990) was due to a shortage of human resources in the Commission, creating a large backlog in the regional Mississauga office.

Counsel for Respondent submits that this delay occasioned actual prejudice against his client, that a continuation of the case would be an abuse of process, and that therefore the complaint should be dismissed.

S. 23(1) of the *Statutory Power Procedure Act*, R.S.O. 1980, c.484 ("SPPA") states:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Respondent cites the following consideration in support of the motion to dismiss:

a. Unreasonable delay offends against the principles of fundamental justice and denigrates the administration of justice. See *Barbara Wahn and Elizabeth Glute v. Gus Kodellas and Tripolis Foods Ltd.* ("Kodellas") (1989), 10 CHRR D/6305, at ¶ 44863, per Vancise J.A. of the Sask. Court of Appeal.

b. The capacity of respondents to defend their case has significantly waned with the passage of time, to the extent that a continuation of the hearing would constitute an abuse of process. The time elapsed should be reckoned from the time when the alleged discrimination took place. See *Ken Morin v. Noranda et al.* (1988), 9 CHRR D/5245, at ¶ 39526.

There has been a heavy turnover of employees, amounting to some 200 to 300 (testimony of Lisa Heron). With the exception of Heron none of the former employees are now connected with the company. The testimony of Andrew Gray shows that, aside of Peter Vincent, he does not know where



these former employees might be located. This further diminishes the ability of Respondent to mount a proper defence. Since a human rights complaint implies an impropriety of conduct, respondent party is entitled to be furnished, prior to the hearing, "with reasonable information of any allegation pertaining thereto." (SCPA, s. 8).

c. Potential prejudice is sufficient, as Vancise J.A. has stated in *Katellias*:

It is not necessary that there be actual prejudice to the wrongdoer as a result of the delay. Delay which causes or can cause prejudice by impairing the ability to mount a full answer and defence is a relevant consideration (at ¶ 44868).

d. Counsel submits that the spirit of Section 7 of the *Charter of Rights and Freedoms* has also been offended.

e. Andrew Gray, currently operations manager of the restaurant, had no involvement with the actual conduct of the business at the time of the alleged acts, and is thereby impaired in his capacity to mount a defence and make a full answer before the Board.

f. The time limitations set forth in the *Ontario Human Rights Code* ("Code"), though they do not address the instant case, have been inserted to protect a respondent, which is the very spirit of s. 7 of the *Charter*.

All seven points are brought forward to highlight Respondent's central claim: that the passage of time -- five years -- has made a proper defense difficult if not impossible and, though it was not expressly stated, onerous and costly. The Board is asked to consider this an abuse of process.

*ad a.* A survey of relevant jurisprudence shows that courts and tribunals have been very hesitant to dismiss proceedings on the basis of delay. There are two obvious reasons for this. One, that the legal justice system is generally overburdened and therefore slow in arriving at judgements and that therefore the charge of long delay would have to be levelled against the majority of contended cases; and two, that dismissal is a harsh and final way of dealing with a legal matter and does not allow for the issues even to be considered. This is especially so when an innocent party, as for instance complainants in a human rights case, have no other avenue of redress but to apply to the Commission, and are thereafter totally in its hands. See *Gohm v. Dumtar et al.* (No.1) (1988), 10 CHRR. D/617, ¶ 43199;

*McMinn v. Sault Ste. Marie Professional Firefighters Association*, (1986) 7 C.H.R.R. D/3458.

However, I must consider whether the claim of Respondent that a proper defense has become impossible is justified. This was succinctly stated by Chairman McCamus in *Hyman v. Southam Murray Printing and International Brotherhood Teamsters Local 419*, (1981), 3 C.H.R.R. D/617 ¶ 5619:

Having been assigned, by order of the Minister of Labour [now of Citizenship] a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made the fulfilment of its task impossible.

and b. Has Respondent's task in fact become impossible? So far I have not been furnished proof that this is the case.

It appears that the other person who worked in the "prep room" with the complainants on a sustained basis and would therefore be a possible witnesses to either the alleged violations or their absence, is in fact available. He is Bruce MacNaughton, for whom a summons has been issued. To be sure, other employees who did not work in the "prep room" and who made only occasional visits to it might be witnesses for one side or the other, but Respondent has stated only in the most general terms that their absence hinders its defense. I cannot, on that basis, rule that Respondent's response is so impaired as to offend against all laws of fairness and natural justice. If it becomes evident during the hearings that indeed such testimony would be important to the defense but is impossible to obtain because of inordinate delay, the possibility of dismissal would still exist.

Furthermore, there is Lisa Heron who still works for the restaurant, and there is the former operations manager, Peter Vincent, whose whereabouts are apparently known. I understand that he and Andrew Gray have parted on less than friendly terms, and the latter might be hesitant to call Vincent as a witness. However, I must assume at the outset that any witness, testifying under oath, will tell the truth, and not until that person's testimony has been heard can its value be properly assessed.

Then, there are the two other respondents, Neil Benvenuti and Joan Hamel, who will have their say. Respondent submits that their absence at the

second hearing provides "an excellent example of the degree of cooperation that Gray's Lakehouse Restaurant can expect in preparing its defense" (p. 9 of the submission). This is a very weak and possibly even inaccurate assumption. One might argue the very opposite, namely, that these parties (whose presence can be secured through summons) will most likely deny that the complaints are justified and would thereby exonerate Respondent Gray's Lakehouse. Clearly, all of this must be left to the hearings.

A further point that militates against dismissal is the absence of any proof that Respondent has tried to locate former employees who might be called upon to sustain a defense, nor did he indicate that any specific witnesses would be unavailable (Transcript, p. 279).

and c. Respondent claims that potential difficulty in mounting as defense is sufficient, and that one does not have to show actual prejudice. In support he cites Kodellas (supra ) ¶ 44868:

Delay which causes or can cause prejudice by impairing the ability to mount a full answer and defence is a relevant consideration. Actual prejudice is a major factor to be considered in this context. Here, by reason of the delay, Mr. Kodellas is forced to attempt to locate witnesses to testify to circumstances which took place some four years ago. The nature of the restaurant business is such that the service personnel do not remain long in the employ of one employer. The mobility and the fact that service personnel frequently change their occupations compound the difficulty that one would normally encounter in locating a witness after a delay of this duration.. Had these matters been proceeded with in a timely fashion, none of that additional effort or expense would have been required, nor the potential prejudice caused by lack of memory or faded memory exist. In my opinion, Mr. Kodellas has demonstrated more than a potential prejudice. He has demonstrated actual prejudice to his ability to mount a fair answer and defence caused by the unexplained and un/reasonable delay in proceeding with these complaints.

and d. In arriving at this conclusion the court relied on s. 7 of the *Charter*, but that reliance is not applicable to a corporate entity, for the rights and freedoms are integral parts of the human being and not for a corporation.



Furthermore, the then manager of the restaurant, Mr. Vincent, had every opportunity to make sure that, after the complaints were filed, potential witnesses be kept in sight and made available to the investigating officer if at all possible. Besides, as indicated, the key persons who might be called to testify are in fact available now: in addition to Mr. Vincent, two of them are themselves respondents, and Mr. MacNaughton will be summoned by subpoena.

It therefore appears that the judgment in *Kodellas* is not applicable in the instant case. However, should the hearings reveal that indeed there has been prejudice to Respondent which would make a proper answer impossible, there will be occasion to raise the issue of delay again.

*ad e.* Respondent also claims that the present manager/owner, Andrew Gray, "had no involvement in the restaurant business at the time of the alleged acts. This will thereby impair his capacity to mount a defense" (p. 9 of submission). However, the complaint is not against him personally, but against the corporation, and the corporation had ample notice of the complaint. Peter Vincent was at the time of the alleged offense and for some time thereafter authorized to represent the restaurant in the matter of the human right complaints, to make submissions and gather evidence (Transcript, pp. 283/4). He represented the corporation and the latter must bear the consequences.

*ad f.* It is submitted that the insertion of time limitations into the *Code* shows the law to be concerned with expeditiousness, and a five year delay contravenes this intent. To be sure, human rights cases should be handled in a much shorter time, but the law is singularly silent on how long an investigation might take and specifies no time when it should be concluded. In view of the fact that other limitations are written into the law but not on this issue, this claim of the Respondent too must fail.

ORDER: With no precedent case law or persuasive arguments to the contrary, the motion to dismiss because of delay is denied and the hearings will proceed as arranged.

Toronto, September 24, 1990

*W. J. Raut*

CHAIRMAN, BOARD OF INQUIRY

